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Magendran a/l Mohan v Public Prosecutor

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO A-05–73 OF 2008
ALAUDDIN PCA, ZULKEFLI AND JAMES FOONG FCJJ
10 DECEMBER 2010

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Criminal Law — Murder — Defence — Alibi — Whether sufficient notice given under s 402A of the Criminal Procedure Code — Whether evidence of rebuttal elicited by prosecution — Whether defence credible — Whether reasonable doubt raised on prosecution case

D

Criminal Law — Penal Code — s 302 — Murder — Appeal, against conviction and sentence — Circumstantial evidence — Whether adverse inference could be drawn from fact that appellant last seen with deceased — Whether appellant satisfactorily identified — Whether credible defence of alibi raised by appellant — Whether chain of circumstances connected appellant to crime

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The appellant was charged under s 302 of the Penal Code for the murder of one Sujitha on 13 August 2000. The body was found along Km88 Lebuhraya Persekutuan Ipoh/Kuala Lumpur lying upwards with both hands tied over the head with a raffia string. The neck was also tied with a plastic rope with one end

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tied to a small tree. The cause of death was stated by the pathologist as ligature strangulation. Police investigation revealed that the deceased had on 12 August 2000 visited her family in Ipoh together with the appellant and on 13 August 2000 at about 2pm both of them left on a motorcycle for Kuala Lumpur. That was the last time the deceased was seen alive. Both of them were lovers staying

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together in a rented room in Petaling Jaya. PW4 (a pawnshop assistant) testified that on 14 August 2000 someone came to his pawnshop to pawn some stolen jewellery. PW4 identified the appellant in the dock as he was ordered by the police to do so. He admitted that he was not sure of the male Indian who came to pawn the jewellery on 14 August 2000. At the close of the trial, the

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High Court judge found the appellant guilty and convicted him of the said charge and sentenced him to death. The Court of Appeal ('COA') dismissed the appellant's appeal and confirmed the conviction and sentence imposed. Hence this appeal to the Federal Court against the conviction and sentence, inter alia, on the following grounds: (i) that the prosecution had failed to prove

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a prima facie case at the close of the prosecution's case; (ii) that the COA judges misdirected themselves in not holding that in cases in which the prosecution rely on circumstantial evidence, the burden upon the prosecution is a very heavy one; (iii) that some of the prosecution's witnesses were interested witnesses with a purpose of their own to serve and their evidence required

corroboration; (iv) that there was a break in the chain of evidence occasioning a gap in the prosecution's case; (v) that the COA judges erred in not making inferences in favour of the appellant on the evidence where there could be two inferences from the set of facts; (vi) that the defence of alibi of the appellant had raised a reasonable doubt in the prosecution's case; and (vii) that the prosecution had failed to prove a case beyond reasonable doubt.

Held, allowing the appeal:

(1) Under cross-examination PW5 admitted that she hated the appellant. It was clear that from her testimony, PW5 was an interested witness with a grudge against the appellant and had a purpose of her own to serve. Hence, her evidence had to be treated with caution and required corroboration. The High Court judge and the judges of the COA had failed to direct their minds on this point. There was a serious misdirection by way of non-direction which had occasioned a miscarriage of justice (see paras 20–21 & 23).

(2) No adverse inference of guilt could be drawn against the appellant from the fact that he was last seen with the deceased, he being no other than her own lover who was naturally expected to be with her. The pawning of the jewellery in itself was also insufficient to implicate the appellant with the murder (see paras 29 & 31).

(3) There was no identification parade conducted by the police for PW4 to identify the appellant. His identification of the appellant in the dock some three years and four months later was most unsatisfactory, especially so when PW4 had stated that he did not know the appellant before that. Hence the identification of the appellant in court to confirm that the appellant was the 'male Indian' who had pawned the jewellery on 14 August 2000 could not be accepted (see para 32 & 35).

(4) In the absence of any other circumstantial evidence to connect the appellant with the deceased body, the learned judge's finding was wholly misconceived. There was no eyewitness to the murder. The prosecution's case was based entirely on circumstantial evidence. It was wrong for the learned judge to draw inference that it was the appellant who had anything to do with the murder (see para 39).

(5) The fact that the deceased's driving license and the pawn receipt were found with the appellant did not in any way implicate the appellant with the murder in view of the fact that they were lovers, which fact was accepted by the prosecution all along. Further, none of the samples of blood, hair and semen/seminal stains recovered connected the appellant by way of DNA testing (see paras 42–43).

(6) The defence of the appellant was one of alibi. Notice under s 402A of the Criminal Procedure Code was given as early as 7 May 2003 ie seven

months before the trial proceeded. However no evidence of rebuttal was elicited by the prosecution. The appellant's defence was credible or at the least it had raised a reasonable doubt on the prosecution's case (see paras 47, 52 & 57).

(7) Normally, the appellate court does not interfere with the concurrent findings of fact of the courts below, in the absence of very special circumstances. But where the courts below ignore, overlook or commit errors of law apparent on the face of the record which results in serious and substantial miscarriage of justice to the accused, it is the duty of the appellate court to step in and correct the legally erroneous decision of the courts below. The prosecution had utterly failed to prove any one of the five circumstances against the appellant. The chain of circumstances was broken at every stage without connecting the appellant to the commission of the alleged crime. The prosecution had also failed to prove as a primary fact all the five circumstances, much less beyond all reasonable doubt bringing home the guilt of the appellant (see paras 59–60).

[Bahasa Malaysia summary

Perayu telah dituduh di bawah s 302 Kanun Keseksaan kerana membunuh Sujitha pada 13 Ogos 2000. Mayatnya ditemui di Km88 Lebuhraya Persekutuan Ipoh/Kuala Lumpur dalam keadaan terlentang dan kedua-dua tangan diikat atas kepala dengan tali rafia. Lehernya juga diikat dengan tali plastik yang hujungnya diikat pada pokok kecil. Sebab kematian yang dinyatakan oleh ahli patalogi adalah akibat penjeratan (*ligature strangulation*). Siasatan polis mendedahkan bahawa pada 12 Ogos 2000 si mati telah melawat keluarganya di Ipoh bersama perayu dan pada 13 Ogos 2000 lebih kurang pukul 2 petang kedua-dua mereka telah menaiki motosikal ke Kuala Lumpur. Itulah kali terakhir si mati dilihat hidup. Kedua-dua mereka merupakan pasangan kekasih yang tinggal bersama di rumah sewa di Petaling Jaya. PW4 (pembantu kedai pajak gadai) telah memberi keterangan bahawa pada 14 Ogos 2000 seseorang telah datang ke kedai pajak gadainya untuk menggadai beberapa barang kemas yang dicuri. PW4 mengenalpasti perayu di kandang tertuduh kerana dia telah diarahkan oleh polis berbuat demikian. Dia mengaku bahawa dia tidak pasti lelaki India itulah yang telah menggadai berang kemas pada 14 Ogos 2000. Di penutup perbicaraan, hakim Mahkamah Tinggi mendapati perayu bersalah dan mensabitkannya atas pertuduhan tersebut dan menjatuhkan hukuman mati ke atasnya. Mahkamah Rayuan ('MR') telah menolak rayuan perayu dan mengesahkan sabitan dan hukuman yang dikenakan. Justeru itu rayuan ini ke Mahkamah Persekutuan terhadap sabitan dan hukuman, antara lain, atas alasan-alasan berikut: (i) bahawa pendakwaan telah gagal membuktikan kes prima facie di penutup kes pendakwaan; (ii) bahawa hakim-hakim MR salah arah apabila memutuskan bahawa dalam kes-kes di mana pendakwaan bergantung kepada keterangan

mengikut keadaan, beban yang terletak pada pendakwaan adalah amat berat; (iii) bahawa beberapa orang saksi pendakwaan merupakan saksi-saksi berkepentingan dengan tujuan mereka sendiri untuk memberi khidmat dan keterangan mereka memerlukan sokongan; (iv) bahawa terdapat rantaian keterangan terputus sehingga menyebabkan jurang dalam kes pendakwaan; (v) bahawa hakim-hakim MR terkhilaf kerana tidak membuat inferens menyebelahi perayu berdasarkan keterangan di mana dua inferens boleh dibuat daripada set fakta-fakta; (vi) bahawa pembelaan alibi perayu telah menimbulkan keraguan munasabah dalam kes pendakwaan; dan (vii) bahawa pendakwaan telah gagal membuktikan kes melampaui keraguan munsabah.

Diputuskan, membenarkan rayuan:

(1) Dalam pemeriksaan balas PW5 mengaku bahawa dia membenci perayu. Adalah jelas bahawa berdasarkan testimoninya, PW5 merupakan saksi berkepentingan dengan dendam terhadap perayu dan mempunyai tujuan tersendiri untuk memberi khidmat. Justeru itu, keterangannya hendaklah diterima dengan berhati-hati dan memerlukan sokongan. Hakim Mahkamah Tinggi dan hakim-hakim MR telah gagal mengarahkan minda mereka berhubung perkara ini. Di sini salah arah serius telah berlaku yang menyebabkan keadilan tidak dilaksanakan (lihat perenggan 20–21 & 23).

(2) Tiada inferens bertentangan berhubung kebersalahan dapat dibuat terhadap perayu berdasarkan fakta bahawa dia yang terakhir dilihat bersama si mati, kerana dia merupakan kekasihnya yang sememangnya dianggap bersamanya. Gadaian barang kemas itu sendiri juga tidak mencukupi untuk mengaitkan perayu dengan pembunuhan tersebut (lihat perenggan 29 & 31).

(3) Tiada barisan pengenalpastian dijalankan oleh polis untuk PW4 mengenalpasti perayu. Pengenalpastiannya terhadap perayu di kandang tertuduh tiga tahun dan empat bulan kemudian tidak memuaskan, terutamanya apabila PW4 menyatakan bahawa dia tidak mengetahui perayu sebelum ini. Justeru itu pengenalpastian perayu di mahkamah untuk mengesahkan bahawa perayu merupakan 'male Indian' yang telah menggadaikan barang kemas pada 14 Ogos 2000 tidak boleh diterima (lihat perenggan 32 & 35).

(4) Dalam ketiadaan apa-apa keterangan mengikut keadaan lain untuk mengaitkan perayu dengan mayat si mati, penemuan hakim yang bijaksana keseluruhannya disalah tanggap. Tiada saksi utama kepada pembunuhan itu. Kes pendakwaan berdasarkan keseluruhannya atas keterangan mengikut keadaan. Adalah salah untuk hakim yang bijaksana membuat inferens bahawa perayu mempunyai apa-apa kaitan dengan pembunuhan tersebut (lihat perenggan 39).

(5) Fakta bahawa lesen memandu si mati dan resit gadaian dijumpa pada perayu ini tidak dalam apa cara mengaitkan perayu dengan pembunuhan berdasarkan fakta bahawa mereka merupakan pasangan kekasih, yang mana pada hakikatnya diterima oleh pendakwaan selama ini. Bahkan, tiada sampel darah, rambut dan air mani/kesan air mani ditemui mengaitkan perayu melalui ujian DNA (lihat perenggan 42–43).

(6) Pembelaan perayu merupakan alibi. Notis di bawah s 402A Kanun Prosedur Jenayah telah diberikan seawal 7 Mei 2003 iaitu tujuh bulan sebelum perbicaraan bermula. Walau bagaimanapun keterangan pematahan telah dibangkitkan oleh pendakwaan. Pembelaan perayu boleh dipercayai atau sekurang-kurangnya telah menimbulkan keraguan munasabah ke atas kes pendakwaan (lihat perenggan 47, 52 & 57).

(7) Biasanya, mahkamah rayuan tidak campur tangan dengan penemuan fakta semasa mahkamah bawahan, dalam ketiadaan keadaan istimewa. Namun di mana mahkamah bawahan telah tidak menghiraukan, terlepas perhatian atau melakukan kesilapan undang-undang yang jelas atas rekod sehingga menyebabkan tiada pelaksanaan keadilan yang serius dan substantif terhadap tertuduh, adalah kewajipan mahkamah rayuan campur tangan dan memperbetulkan keputusan perundangan yang tersilap dibuat oleh mahkamah bawahan. Pendakwaan sememangnya telah gagal untuk membuktikan mana-mana satu daripada lima keadaan terhadap perayu. Rantaian keadaan terputus di setiap peringkat tanpa mengaitkan perayu dalam perlakuan jenayah yang dikatakan itu. Pendakwaan juga gagal membuktikan semua lima keadaan yang merupakan fakta penting bahkan tidak juga melampaui keraguan munsabah untuk menunjukkan kebersalahan perayu (lihat perenggan 59–60).]

Notes

For cases on defence, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1355–1369.

For cases on s 302 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1698–1776.

Cases referred to

Abdullah bin Saad v PP [1956] MLJ 92, CA (refd)
Arumugam s/o Muthusamy v PP [1998] 3 MLJ 73, FC (refd)
Chan Chwen Kong v PP [1962] MLJ 307, CA (refd)
Chandmal & Anor v State of Rajasthan AIR 1970 SC 917 (refd)
Chang Kim Siong v PP [1968] 1 MLJ 36, FC (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Hanumant Govind Nargundkar and another v State of Madhya Pradesh AIR 1952 SC 343 (refd)
Illian & Anor v PP [1988] 1 MLJ 421, SC (refd)

Jayaraman & Ors v PP [1982] 2 MLJ 273 (refd)
Kamis v PP [1975] 1 MLJ 46, FC (refd)
Kanan & Ors v State of Kerala AIR 1979 SC 1127 (refd)
Karam Singh v PP [1967] 2 MLJ 25, FC (refd)
Kishore Chand v State of Himachal Pradesh AIR 1990 SC 2140 (refd)
Lim Boon San v PP [1968] 2 MLJ 45 (refd)
Lim Foo Yong v PP [1975] 2 MLJ 259 (refd)
Liow Siow Long v PP [1970] 1 MLJ 40 (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65, CA (refd)
Mahmud Jamili bin Zaudin & Anor v PP [1995] 4 MLJ 243, HC (refd)
Muniandy & Anor v PP [1973] 1 MLJ 179, FC (refd)
PP v Syed Muhamad Faysal bin Syed Ibrahim [2004] 6 MLJ 302; [2004] 4 AMR 31 (refd)
Rangapula & Anor v PP [1982] 1 MLJ 91 (refd)
Shanmugam v PP [1963] MLJ 125 (refd)
Tai Chai Keh v PP [1948–1949] Supp MLJ 105, CA (refd)
Vasan Singh v PP [1988] 3 MLJ 412, SC (refd)

Legislation referred to

Criminal Procedure Code [SG] s 155(9)
Criminal Procedure Code s 402A
Evidence Act 1950 s 114(g)
Federal Constitution art 5
Penal Code s 302

Appeal from: Criminal Trial No A–05 of 2005 (Court of Appeal, Putrajaya)

Gurbachan Singh s/o Bagawan Singh (Charanjit Singh with him) (Bachan & Kartar) for the appellant.
Nurulhuda Nur'aini bt Mohd Nor (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Alauddin PCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant was charged for the murder of one Sujitha a/p Subramaniam which took place between 2.15pm and 9pm on 13 August 2000 at the Km 88 Lebuhraya Persekutuan Ipoh/Kuala Lumpur.

[2] The charge reads as follows:

> Bahawa kamu pada 13 Ogos 2000, di antara jam 2.15 petang hingga 9.00 malam, di Kilometer 88, Jalan Persekutuan Ipoh-Kuala Lumpur, Behrang Station, di dalam Daerah Batang Padang, di dalam Negeri Perak, telah melakukan pembunuhan dengan menyebabkan kematian Sujitha a/p Subramaniam, KL No:

A 771003–02–5576, oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum dibawah Seksyen 302 Kanun Keseksaan.

[3] At the close of the trial before the High Court at Ipoh, the learned High Court judge found the appellant guilty and convicted him of the said charge and sentenced him to death.

[4] On appeal to the Court of Appeal ('COA'), the learned judges of the COA dismissed the appellant's appeal and confirmed the conviction and sentence imposed.

[5] The appellant has now appealed to the Federal Court against the conviction and sentence.

FACTS OF CASE

[6] The narrative of the prosecution's case runs thus:

On 14 August 2000 at about 2pm one Mohd Arif bin Pandak Kamal ('PW2') while doing supervisory work on pipe laying for water supply project in the Slim River area stumbled upon a dead body and went to report the same to PW1 who was on duty at the Behrang Police Station. Upon receipt of the information PW1 accompanied by a colleague proceeded to the scene and discovered a body of a female clad in a dark coloured bra and blue jeans. The face was covered with blood and there were wounds on the head and cheek. A pair of shoes, a belt, a black T-shirt and a pair of spectacles were also seen nearby. A police report vide Behrang Report No 288/2000 (P2) was lodged by this witness. Soon afterwards the scene of the crime was visited by the investigating officer ('PW16') together with a police photographer and one Chief Inspector Somu ('PW13'). The scene was identified as KM 88 Lebuhraya Persekutuan Ipoh/Kuala Lumpur. The body was found lying upwards with both hands tied over the head with a raffia string. The neck was also tied with a plastic rope with one end tied to a small tree. The sketch plan (P76) of the scene was drawn by PW16. The body was later taken to the District Hospital Tanjung Malim where a post mortem was conducted on 15 August 2000. PW13 and members of the deceased family identified the body during the post mortem. The cause of death was stated by the pathologist as ligature strangulation. Police investigation revealed that the deceased had on 12 August 2000 visited her family in Ipoh together with the appellant and on 13 August 2000 at about 2pm both of them left on a motorcycle for Kuala Lumpur. That was the last time the deceased was seen alive. It was established that both of them were lovers staying together in a rented room in Petaling Jaya.

THE APPEAL

[7] In all there were 22 grounds of appeal raised by the appellant in his

petition of appeal. However the thrust of the appellant's submission before us were based only on the following grounds:

(a) The learned judges of the Court of Appeal (COA) erred in not holding that the prosecution had failed to prove a prima facie case against the appellant at the close of the prosecution's case.

(b) The learned judges of the COA misdirected themselves in not holding that in cases in which the prosecution rely on circumstantial evidence, the burden upon the prosecution is a very heavy one.

(c) The learned judges of the COA erred and misdirected themselves by not holding that some of the prosecution's witnesses were interested witnesses with a purpose of their own to serve and their evidence required corroboration.

(d) The learned judges of the COA erred in not holding that there was a break in the chain of evidence occasioning a gap in the prosecution's case.

(e) The learned judges of the COA erred in not making inferences in favour of the appellant on the evidence where there could be two inferences from the set of facts.

(f) The learned judges of the COA should have held that the defence of alibi of the appellant which was corroborated by PW14 had raised a reasonable doubt in the prosecution's case.

(g) The learned judges of the COA erred in not holding that at the close of the defence case, the prosecution had failed to prove a case beyond reasonable doubt.

FINDINGS OF THE COURT

[8] We shall start by saying that the prosecution in the instant appeal chose to rely upon mere circumstantial evidence.

[9] The law on circumstantial evidence, in our opinion, is well settled. There are numerous decisions by the courts in our country as well as other jurisdictions which deal with circumstantial evidence.

[10] The mode of evaluating circumstantial evidence has been stated by the Supreme Court of India in *Hanumant Govind Nargundkar and another v State of Madhya Pradesh* AIR 1952 SC 343 as follows:

> It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should

A be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

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[11] Again, in *Chandmal & Anor v State of Rajasthan* AIR 1970 SC 917, the Supreme Court of India in dealing with circumstantial evidence had this to say:

C It is well settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests. Firstly, the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. Secondly, those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused. Thirdly, the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else. That D is to say the circumstances should be incapable of explanation on any reasonable hypothesis save that of the accused's guilt (see also *Gambhir v State of Maharashtra* AIR 1982 SC 1157).

E **[12]** In *Kishore Chand v State of Himachal Pradesh* AIR 1990 SC 2140, the Supreme Court of India was again confronted with the issue of circumstantial evidence and speaking through K Ramaswamy J it held that:

The entire prosecution case rested on circumstantial evidence …

F The question, therefore, is whether the prosecution proved guilt of the appellant beyond all reasonable doubt. In a case of circumstantial evidence, all the circumstances from which the conclusion of the guilt is to be drawn should be fully and cogently established. … The circumstances must be satisfactorily established and the proved circumstances must bring home the offences to the accused beyond all reasonable doubt.

G ... In other words when there is no direct witness to the commission of murder and the case rests entirely on circumstantial evidence, the circumstances relied on must be fully established. … If any of the circumstances proved in a case are consistent with the innocence of the accused or the chain of the continuity of the circumstances is broken, the accused is entitled to the benefit of the doubt.

H ... There is a long distance between may be true and must be true. The prosecution has to travel all the way to establish fully all the chain of events which should be consistent only with hypothesis of the guilt of the accused. … In other words, there must be a chain of evidence so far consistent and complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and I it must be such as to show that within all probability the act must have been done by the accused and the accused alone.

[13] Back home in *Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307, Thomson CJ (as he then was) observed:

> ... where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?

[14] In *Karam Singh v Public Prosecutor* [1967] 2 MLJ 25, HT Ong FJ (as he then was) noted:

> ... In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused …

(See also *Muniandy & Anor v Public Prosecutor* [1973] 1 MLJ 179, *Kamis v Public Prosecutor* [1975] 1 MLJ 46, *Lim Foo Yong v Public Prosecutor* [1976] 2 MLJ 259 and *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232).

[15] The Federal Court, in *Chang Kim Siong v Public Prosecutor* [1968] 1 MLJ 36 stated:

> The onus on the prosecution where the evidence is of a circumstantial nature is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it, then it is not sufficient.

[16] In *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 273 Syed Othman FJ (as he then was) has the following to say of a judge dealing with circumstantial evidence. At p 280 of the report His Lordship opined:

> I am well aware that the 'irresistible' formula has been used by the courts here in dealing with circumstantial evidence. But I would like to refer here to *Mc Greevy v Director of Public Prosecution* where it was argued at p 279, before the House of Lords that in criminal trial in which the prosecution case, or any essential ingredient thereof, depends, as to the commission of the act, entirely on circumstantial evidence, it is the duty of the trial judge, in addition to giving the usual direction that the prosecution must prove the case beyond reasonable doubt, to explain to the jury in terms appropriate to the case being tried that this direction means that they must not convict on circumstantial evidence unless they are satisfied that the facts proved are: (a) consistent with the guilt of the accused; and (b) exclude every reasonable explanation other than the guilt of the accused.

[17] To reiterate, there was no eyewitness version of the incident in this appeal and the prosecution entirely based its case on circumstantial evidence. Learned counsel for the appellant vigorously urged before us that the circumstances relied on by the prosecution have not been satisfactorily

established and that in any event the circumstances said to be established against the appellant do not provide a complete chain to bring home the guilt against the appellant.

[18] It is appropriate at this juncture that we refer to the circumstances relied on by the prosecution and accepted by the trial court:

(a) The appellant was last seen with the deceased. The appellant was alleged to have a quarrel with the deceased and said 'Saya akan tengok awak di sana' or 'Saya akan ajar awak'. PW8's evidence regarding the jewellery.

(b) The evidence given by PW4, the pawnshop assistant, regarding the jewellery pawned by the appellant.

(c) The evidence of PW14, the deceased's housemate.

(d) The evidence of PW15, the appellant's acquaintance.

(e) The personal belongings of the deceased found in appellant's possession.

[19] We shall deal with each circumstantial evidence separately. First, the conduct of the appellant at the deceased mother's house in Ipoh on 12 August 2000. PW5, the sister of the deceased, gave evidence that the appellant and the deceased had a quarrel on 12 August 2000. The appellant allegedly said 'saya akan tengok awak di sana' or 'saya akan ajar awak di sana'. However when re-examined she said 'Magendran kata dengan marah saya akan datang sana dan lihat'. PW5 admitted in evidence that she did not know what the quarrel was about and what the words spoken by the appellant meant. We need to mention here that when the appellant and the deceased were in the house both PW8 (the deceased's other sister) and PW11 (the deceased's mother) were present (ie on the night of 12 August 2000). However neither of them did mention anything about the quarrel between the appellant and the deceased in their evidence. It is strange that only PW5 heard the quarrel. As regards the jewellery, PW8 was the only witness who said in evidence that on the night of 12 August 2000 the deceased was wearing jewellery. She identified the jewellery (P5–P8) in court. However there was no evidence by PW5 or PW11, who were also present there, that the deceased was wearing jewellery on 13 August 2000 when she left the house in the afternoon together with the appellant. It is strange that only PW8 noticed the deceased wearing the jewellery.

[20] There is this other aspect of the evidence of PW5. Under cross-examination PW5 admitted that she hated the appellant. This is what she said in evidence: 'Sekarang saya benci Magendran. Saya benci kerana dia bunuh adik saya. Saya setuju saya tidak lihat Magendran bunuh adik saya' (see pp 62 and 63 of the AR).

[21] It is clear to us that from her testimony she was an interested witness with a grudge against the appellant and had a purpose of her own to serve. In our judgment her evidence must be treated with caution and requires corroboration.

[22] In *Liow Siow Long v Public Prosecutor* [1970] 1 MLJ 40, Raja Azlan Shah J (as His Highness then was) had this to say (at p 41) in respect of interested witnesses:

> Testimony of close relations is not tainted if it is otherwise reliable in the sense that the witnesses and competent witnesses who were at the scene of the occurrence and could have seen what had happened. But if it is proved that they are not entirely disinterested witnesses, eg they are either partisans of the complainant or are in any way inimical to the accused, then their testimony is tainted and requires corroboration if to be acted upon.

[23] The same learned judge in *Lim Boon San v Public Prosecutor* [1968] 2 MLJ 45 held that where a witness may be regarded as having a purpose of his own to serve, the judge must direct his mind on the danger of convicting on the uncorroborated evidence of such witness. In the instant appeal before us we find that PW5 was undoubtedly hostile towards the appellant and we regret to say that there was no corroboration of such evidence by either PW8 (sister) or PW11 (mother). If we may add, the evidence of PW5, PW8 and PW11 were most inconsistent with one another. With the greatest of respect to the High Court judge and the judges of the COA we must say that they have failed to direct their minds on this point and for this reason we rule that there was a serious misdirection by way of non-direction which had occasioned a miscarriage of justice.

[24] Now, coming back to the evidence of PW5 regarding the quarrel between the appellant and the deceased on the night of 12 August 2000.

[25] The prosecution's evidence was that the deceased was 'berbual-bual dengan ahli keluarga SP5-Susila, SP8-Suguma and SP11-Manomoney'. Yet none of the other members of the family, except PW5, who testified in court said that there was a quarrel. Indeed none of the prosecution witnesses stated that the deceased quarrelled again with the appellant or that the appellant was angry with the deceased on 13 August 2008.

[26] It stands to reason, therefore, that two inferences can be drawn from this fact namely:

(a) that this incident never occurred as no other witness recalled such a quarrel; or

A (b) that there was a quarrel on 12 August 2000 and not on 13 August 2000.

[27] When there are two inferences, the inference most favourable to the appellant should be drawn. In *Tai Chai Keh v Public Prosecutor* [1948–1949] Supp MLJ 105 at p 108, His Lordship Laville J said:

B

> ... Where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, we are of the opinion that the inference most favourable to the accused should be adopted

C (See also *Public Prosecutor v Syed Mohamed Faysal bin Syed Ibrahim* [2004] 6 MLJ 302; [2004] 4 AMR 31).

[28] In our judgment the same principle should also apply in respect of the evidence of PW8 with regard to the jewellery worn by the deceased. Neither PW5 nor PW11 who testified in court said anything about the jewellery.

D

[29] Our comment on the 'last seen theory' is that no adverse inference of guilt can be drawn against the appellant from the fact that he was last seen with the deceased, he being no other than her own lover who is naturally expected to be with her.

E

[30] We shall now move on to the next circumstantial evidence relied on by the prosecution ie the evidence of PW4, the pawnshop assistant. In his evidence PW4 said that on 14 August 2000 someone came to his pawnshop to pawn some stolen jewellery. He could not remember what was pawned. He did not know the appellant before this. He identified the appellant in the dock as he was ordered by the police to do so. He admitted that he was not sure of the male Indian who came to pawn the jewellery on 14 August 2000. He also agreed, in cross-examination, that he was not asked by the police to identify the jewellery that was recovered. He agreed that he was not sure of the jewellery that was pawned.

F

G

[31] In our opinion the pawning of the jewellery in itself is insufficient to implicate the appellant with the murder. Thus in *Abdullah bin Saad v Public Prosecutor* [1956] MLJ 92, the court held that the fact that the accused pawned some jewellery belonging to the deceased a day after the killing could not by itself be sufficient evidence to form a conviction of murder under illustration (d) of s 114 of the Evidence Act 1950.

H

I

[32] From the evidence of PW4, we also observed that there was no identification parade conducted by the police for PW4 to identify the appellant. His identification of the appellant in the dock some three years and four months later is in our opinion most unsatisfactory, especially so when PW4 had stated that he did not know the appellant before this (see *Arumugam*

s/o Muthusamy v Public Prosecutor [1998] 3 MLJ 73 and *Public Prosecutor v Syed Muhamad Faysal bin Syed Ibrahim* [2004] 6 MLJ 302). A

[33] *Sarkar's Law of Evidence* (15th Ed) 1999 Vol 1 (at pp 209–231) states as follows: B

> Identification by a witness of an accused who was not known to him, prior to the incident is valueless (*Harsh Naval Misty v State of Gujarat,* (1993) 1 Crimes 451 (GUM)) …
>
> ... Identification of culprits who are not known to him for the first time in court cannot be relied upon in the absence of corroboration by an earlier test identification parade (*Shyamlal Pradhan State of Orissa* (1996) Cri LJ 1019, 1020 (Ori); *Kanan & Ors v State of Kerala* AIR 1979 SC 1127) … C

In *Rangapula & Anor v Public Prosecutor* [1982] 1 MLJ 91 at pp 93 and 95, Yusof Abdul Rashid J said: D

> ... Where the evidence of identity is poor then there is a need for supporting evidence as to the identification of an accused. … It is not enough for the learned President to believe PW4 regarding the identification of the appellants just because PW4 had known the appellants for quite a considerable length of time. At the material day and time, he was able to see the appellants in a flash. As Lord Widgery CJ said in the English Court of Appeal case of *R v Turnbull & Ors* at p 552: E
>
> ... even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometime's made. F
>
> On the above grounds I would allow the appeal and set aside the conviction and sentence.

[34] In *Kanan & Ors v State of Kerala* AIR 1979 SC 1127 at p 1128, Fazal Ali J for the Supreme Court said: G

> It is well settled that where a witness identify an accused who is not known to him in the court for the first time, his evidence is absolutely valueless unless there have been a previous TI parade to test his powers of observations. The idea of holding TI parade under s 9 of the Evidence Act is to test the veracity of the witness on the question of his capability to identify an unknown person whom the witness may have seen only once. If no TI parade is held, then it would be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in court. H

I

[35] In view of the above omission by the prosecution and since the 'male Indian' was not known to PW4, this court is unable to accept the identification of the appellant in court to confirm that the appellant was the 'male Indian' who had pawned the jewellery on 14 August 2000.

[36] Next, we shall examine the evidence of PW14, the deceased's housemate. In her testimony PW14 stated that she last saw the deceased on Friday. The following Sunday she met the appellant and asked him about the deceased. The appellant informed her that the deceased had gone to her friend's house. Since the deceased had not returned home PW14 again asked the appellant about her whereabouts. Again the appellant replied the deceased had gone to her friend's house. About four days later PW14 asked the appellant the same question. At this point of time the appellant replied that he had killed the deceased. PW14 did not believe the appellant because she felt that the appellant was joking with her. PW14 admitted that the appellant and the deceased were lovers. She said when she met the appellant on Sunday the appellant's behaviour was normal. It was after her incessant questioning that the appellant jokingly said that he had killed the deceased. PW14 did not believe the appellant. She reiterated that the relationship between the appellant and the deceased was good.

[37] With respect, we find that nothing turns on the evidence of PW14. On the contrary, PW14's evidence was much in favour of the appellant except for that part which he said he had killed the deceased. However PW14 had stressed that she did not believe the appellant because he was very fond of joking with her.

[38] With regard to PW14's evidence the learned judge's finding was that although the appellant 'may have uttered those words jokingly and the witness SP14 not believing what has been told to her, the fact remains that the deceased was subsequently found dead, either by coincidence or otherwise'.

[39] With respect, in the absence of any other circumstantial evidence to connect the appellant with the deceased body, we find that the learned judge's finding is wholly misconceived. There is no eyewitness to the murder. The prosecution's case was based entirely on circumstantial evidence. It is wrong for the learned judge to draw inference that it was the appellant who had anything to do with the murder.

[40] Next we refer to the evidence of PW15, the appellant's acquaintance. In a gist, the evidence of PW15 was that the appellant had informed him that he had a quarrel with his girlfriend. The appellant then took him to a highway near a bridge. It took them 45 minutes on a motorcycle to reach the place. However PW15 could not remember the date and time when he went there. In cross-examination PW15 informed the court that the last time he saw the appellant was two months prior to his arrest. He also testified that he visited the place on the highway about two months prior to the appellant's arrest.

However, when re-examined PW15 changed his evidence and said that he visited the place ten days after the appellant's arrest. Later he said he was not sure of the date.

[41] Having considered the entire evidence of PW15 we find that he was a wholly unreliable witness as his evidence was tainted with contradictions (see pp 118–199 of the AR). The learned trial judge's reliance on his evidence, is, in our view, totally misconceived.

[42] The last piece of circumstantial evidence relied on by the prosecution was the discovery of the driving licence of the deceased and the pawn receipt (P10) in the appellant's wallet. Our short answer to this is that the fact that the driving licence and P10 were found with the appellant does not in any way implicate the appellant with the murder in view of the fact that they were lovers, which fact was never disputed but instead accepted by the prosecution all along.

[43] The evidence of PW13 (Inspector Somu) and PW16 (IO) revealed that blood, hair and semen/seminal stains were recovered. However, none of the samples connected the appellant by way of DNA testing nor did the raffia string etc show any fingerprint evidence to implicate the appellant. There was also no evidence of the appellant's footprints on the area where the deceased's body was found. Although soil was retrieved by the police it did not connect or implicate the appellant. According to the evidence of PW10 (chemist) there was also delay in sending the exhibits resulting in degrading of the samples (see pp 95–98 of the AR).

[44] The test at the end of the prosecution's case is 'prima facie case' based on a maximum evaluation of evidence. The evidence has to be scrutinised properly and not perfunctorily, cursorily or superficially. If the evaluation of the evidence results in doubt in the prosecution's case, then a prima facie case has not been made out. The defence ought not to be called merely to clear or clarify such doubts.

[45] Based on what we have said thus far we would conclude by saying that the prosecution has failed to establish a prima facie case and as such defence should not have been called (see *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65).

[46] Assuming for a moment that our decision above is wrong, we shall now evaluate the appellant's defence.

[47] From the records, we find that the defence of the appellant is one of alibi. 'Evidence in support of alibi' means evidence tending to show that by

reason of the presence of the accused at a particular place or particular area at a particular time he was not or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission (see s 155(9) of the Singapore CPC (Cap 69, 1985).

[48] In *Illian & Anor v Public Prosecutor* [1988] 1 MLJ 421, the then Supreme Court, in dealing with the issue of alibi held that as regards the defence of alibi, all that an accused person had to do is to raise a reasonable doubt that he was the person at the scene of the crime. The proper approach is for the learned trial judge to consider at the close of the defence case whether he had indeed succeeded in doing so. It was also held that s 114(g) of the Evidence Act cannot be invoked against an accused person nor can the failure of the accused to call any witness be made the subject of comment at a criminal trial.

[49] In *Mahmud Jamili bin Zaudin & Anor v Public Prosecutor* [1995] 4 MLJ 243 it was held as follows:

> As regards alibi, all that the accused needed to do was to raise a reasonable doubt that he was the person at the scene of crime.

[50] The court in *Shanmugam v Public Prosecutor* [1963] MLJ 125 also held that:

> Where the defence to a criminal charge is an alibi it was not necessary that the accused prove his alibi beyond reasonable doubt. All that he has to do is to cast a doubt upon the prosecution story. *It is not necessary for this to be achieved that the evidence of the accused should be corroborated.* (Emphasis added.)

[51] The Federal Court in *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232, held that the burden of proving an alibi lies on the accused setting up the defence but even so the burden of proof as to the guilt of the accused always remains on the prosecution irrespective of whether or not the accused had made a plausible defence.

[52] Now, coming back to the instant appeal before us, we observed that the notice under s 402A of the CPC was given as early as 7 May 2003 ie seven months before the trial proceeded. However no evidence of rebuttal was elicited by the prosecution from either PW16, the IO or PW13, C/Insp Somu. Indeed in cross-examination counsel for the defence asked PW16 whether he had conducted any other investigation apart from what he had told the court. His answer (at p 147 of the AR) was:

> Selain dari siasatan ini tiada siasatan lanjut lain yang saya buat.

[53] The whole purpose of alibi is to alert the prosecution to the fact that an alibi might be relied upon so that they may have the opportunity before trial of making such investigation as they think fit (see *Vasan Singh v Public Prosecutor* [1988] 3 MLJ 412 at p 414).

[54] In his notice of alibi the appellant specifically stated that from 2.15pm on 13 August 2000 he left Ipoh with Sugitha (the deceased) on a motorcycle and at 4.45pm he had already reached Kuala Lumpur and left the deceased at a roadside in Petaling Jaya.

[55] In cross-examination the prosecution had not challenged this piece of evidence, particularly, the fact that the deceased was still alive when the appellant left her at the roadside in Petaling Jaya.

[56] In his alibi evidence the appellant also stated that he returned to his house at 21, Jalan 14/40, Petaling Jaya on that day. PW14, in her evidence in court said this: 'Hari Ahad saya pergi pasar malam bersama suami dan nampak Mahendran masuk ke rumah.' Indeed there was corroboration of the appellant's alibi that he had returned home that Sunday. This piece of evidence was also not challenged by the prosecution. In any case his alibi evidence need not be corroborated (see *Shanmugam*'s case)

[57] Having said that, we would conclude that the appellant's defence is credible or at the least it had raised a reasonable doubt on the prosecution's case.

[58] In the course of her submission before us the learned deputy public prosecutor had intimated to us the danger of interfering with the concurrent findings of the courts below.

[59] Normally, the appellate court does not interfere with the concurrent findings of fact of the courts below, in the absence of very special circumstances. But where the courts below ignore, overlook or commit errors of law apparent on the face of the record which results in serious and substantial miscarriage of justice to the accused, it is the duty of the appellate court to step in and correct the legally erroneous decision of the courts below.

[60] Thus considered we find that the prosecution has utterly failed to prove any one of the five circumstances against the appellant. We also find that the chain of circumstances was broken at every stage without connecting the appellant to the commission of the alleged crime. The prosecution has also failed to prove as a primary fact all the five circumstances, much less beyond all reasonable doubt bringing home the guilt of the appellant.

[61] Before parting with the case, it is necessary to state that from the facts and circumstances of this appeal it would appear to us that the investigation had been somewhat shoddy. Undoubtedly, heinous crimes are committed under great secrecy and that investigation of a crime is a difficult and tedious task. At the same time the life and personal liberty of a citizen is a precious one guaranteed by art 5 of the Federal Constitution and its deprivation shall be only in accordance with law.

[62] Thus, before accusing an innocent person of the commission of a grave crime like the one punishable under s 302 of the PC, an honest, sincere and dispassionate investigation has to be made and to feel sure that the person suspected of the crime alone was responsible to commit the offence. Therefore, greater care and circumspection are needed by the investigating agency in this regard.

CONCLUSION

[63] We are conscious that a grave and heinous crime has been committed but when there is no satisfactory proof of the guilt we have no other option but to give the benefit of doubt to the appellant and we are constrained to do so in this appeal. Accordingly, the appeal is allowed. The conviction and sentence of the appellant is set aside. The appellant is acquitted and discharged.

Appeal allowed.

Reported by Kanesh Sundrum